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In the United States Circuit Court of Appeals for the Seventh Circuit

No. 8142

WESTERN CARTRIDGE COMPANY, A CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND AMERICAN FEDERATION OF LABOR AND ITS AFFILIATED ORGANIZATIONS, RESPONDENTS

No. 8155

WESTERN CARTRIDGE EMPLOYEES' INDEPENDENT UNION, A VOLUNTARY ASSOCIATION TRADE UNION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND AMERICAN FEDERATION OF LABOR AND ITS AFFILIATED ORGANIZATIONS, RESPONDENTS

ON PETITIONS TO SET ASIDE AND ON REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon separate petitions filed by Western Cartridge Company and Western Car-

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tridge Employees' Independent Union to review and set aside an order issued by the National Labor Relations Board against petitioner, Western Cartridge Company, herein called the Company, pursuant to Section 10 (c) of the National Labor Relations Act (49 State. 449, U. S. C. Supp. V, Title 29, Sec. 151, *et seq.*).[1]

In its answer to the Company's petition, the Board requested that its order be enforced. The Board's decision, including its findings of fact, conclusions of law, and order (Supp. 13–50),[2] is reported in 44 N. L. R. B., at page 1. The jurisdiction of this Court is based upon Section 10 (e) and (f) of the Act; the unfair labor practices occurred at the Company's plant at East Alton, Illinois, within this judicial circuit.

STATEMENT OF THE CASE

Upon charges filed by the American Federation of Labor and two of its affiliated organizations,[3] and upon the usual proceedings under Section 10 of the Act, fully described in the decision (Supp. 13–16), the Board, on September 16, 1942, issued its findings of fact, conclu-

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[1] On December 12, 1942, the Court ordered that the causes be consolidated for the purposes of briefing and argument.

[2] References preceding semicolons are to the Board's decision, which is printed in the supplement to the Company's brief; "Supp." signifies references to that supplement; "B. A." signifies references to portions of the record printed in the appendix to this brief; and references to unprinted portions of the transcript of record are designated "Tr."

[3] The affiliates of the A. F. of L. here involved are Chemical Workers Local Union No. 22574, herein called Local 22574, and International Molders and Foundry Workers Union of North America, Local 333, herein called Local 333.

sions of law, and order, which may be briefly summarized as follows:

1. *The business of the Company* (Supp. 16–17).—The Company, a Delaware corporation, is a large manufacturer of munitions. It has more than 6,000 employees at its East Alton plant (Supp. 207; Bd. Exh. Nos. 3–B, 23, B. A. 99, 143); a river flows through the plant site, separating the smokeless powder division from the other departments of the plant.[4] No jurisdictional question is presented (Bd. Exh. Nos. 1–A and B–2, Supp. 2–3, 10).

2. *The unfair labor practices* (Supp. 17–45).—The Company induced its employees to sign individual contracts which infringe rights guaranteed employees by the Act, in order to create a barrier to union organization among them (Supp. 17–20). By continuing that practice, subsequent to the effective date of the Act, the Company violated Section 8 (1) of the Act (Supp. 21). It violated Section 8 (1) and (2) of the Act by dominating and interfering with the formation and administration of Western Cartridge Employees Independent Union, a labor organization of its employees, herein called the Independent, and by contributing support to that organization (Supp. 21–38). The Company violated Section 8 (1) and (3) of the Act by discharging William Elliott because of his withdrawal from the Independent and affiliation wtih Local 333 (Supp. 39–43). In further violation of Section 8 (1) of the Act, the Company disparaged outside unions,

[4] To distinguish between the smokeless powder division and the other departments, we refer to the latter as the Western Side.

warned its employees not to join such unions, intimated that it might remove its plant to avoid dealing with an outside union, and interfered with, restrained, and coerced its employees in other ways, in order to compel them to support the Independent and to deter them from membership in outside unions (Supp. 25–34).

3. *The Board's order* (Supp. 48–50).—The Board ordered the Company to cease and desist from its unfair labor practices, to withdraw recognition from and disestablish the Independent, to cease giving effect to the individual contracts found to violate the Act, and to inform its employees that they were no longer bound by those contracts, to reinstate Elliott with back pay, and to post appropriate notices.[5]

THE CONTESTED ISSUES

The contested issues are: (1) whether the Board's findings of fact concerning the unfair labor practices are supported by substantial evidence; (2) whether the Independent was accorded a fair hearing; and (3) whether the Board's order is valid.

PROPOSITIONS OF LAW RELIED UPON

A. The Company interfered with the right to self-organization of its employees, in violation of Section 8 (1) of the Act, by:

1. Urging its employees to withdraw from membership in outside unions, offering employees inducements to support the Independent, disparaging outside

[5] Finding that the Company had not discriminated against seven employees named in the complaint, the Board dismissed the complaint as to them (Supp. 43–45).

unions, villifying their leaders, intimating that it might remove its plant rather than deal with such a union, and warning employees that their union activities were under surveillance by labor spies. ***H. J. Heinz Company* v. *N. L. R. B.,*** 311 U. S. 514, 518; ***Valley Mould & Iron Corp.* v. *N. L. R. B.,*** 116 F. (2d) 760, 762–764 (C. C. A. 7), cert. denied, 313 U. S. 590; ***Rapid Roller Co.* v. *N. L. R. B.,*** 126 F. (2d) 452, 456–457 (C. C. A. 7), cert. denied, 63 S. Ct. 45.

2. Urging its employees to sign individual contracts for the purpose of keeping unions out of its plant, which contracts by their terms and by the manner in which they were interpreted infringe upon rights guaranteed employees by the Act. ***National Licorice Co.* v. *N. L. R. B.,*** 309 U. S. 350, 359–360; ***N. L. R. B.* v. *Jahn & Ollier Engraving Co.,*** 123 F. (2d) 589, 592–593 (C. C. A. 7); ***N. L. R. B.* v. *Superior Tanning Co.,*** 117 F. (2d) 881, 890–892 (C. C. A. 7), cert. denied, 313 U. S. 559; *N. L. R. B.* v. *Stone,* 125 F. (2d) 752, 754, 756 (C. C. A. 7), cert. denied, 63 S. Ct. 44; *N. L. R. B.* v. *Vincennes Steel Corp.,* 117 F. (2d) 169, 171–172 (C. C. A. 7); *N. L. R. B.* v. *Bear Brand Hosiery Co.,* decided November 27, 1942, 11 L. R. R. 453.

B. The Company interfered with the formation and administration of the Independent, and contributed support to it, in violation of Section 8 (1) and (2) of the Act. ***N. L. R. B.* v. *Link-Belt Co.,*** 311 U. S. 584, 597–600; ***International Association of Machinists* v. *N. L. R. B.,*** 311 U. S. 72, 78; ***Reliance Mfg. Co.* v. *N. L. R. B.,*** 125 F. (2d) 311, 314 (C. C. A. 7); *N. L. R. B.* v. *Bradford Dyeing Ass'n,* 310 U. S. 318, 336–338;

N. L. R. B. v. *Falk Corp.*, 308 U. S. 453, 461; *Colorado Fuel & Iron Corp.* v. *N. L. R. B.*, 121 F. (2d) 165, 175 (C. C. A. 10); *idem.*, on contempt, based upon recognition of a successor to the dominated union, 10 L. R. R. 553, decided June 8, 1942; *N. L. R. B.* v. *Texas Mining & Smelting Co.*, 117 F. (2d) 86, 88–89 (C. C. A. 5); *N. L. R. B.* v. *Eclipse Moulded Products Co.*, 126 F. (2d) 576, 578 (C. C. A. 7); *N. L. R. B.* v. *Aluminum Products Co.*, 120 F. (2d) 567, 571 (C. C. A. 7); *N. L. R. B.* v. *Auburn Foundry, Inc.*, 119 F. (2d) 331, 334–335 (C. C. A. 7).

C. The Company violated Section 8 (1) and (3) of the Act by discharging an employee because he resigned from the Independent and joined Local 22574. ***N. L. R. B.* v. *Nevada Consolidated Copper Corp.***, 316 U. S. 105; ***New York Handkerchief Mfg. Co.* v. *N. L. R. B.***, 114 F. (2d) 144, 147 (C. C. A. 7), cert. denied, 311 U. S. 704; ***N. L. R. B.* v. *Chicago Apparatus Co.***, 116 F. (2d) 753, 759 (C. C. A. 7).

D. The Board's order is valid. ***National Licorice Company* v. *N. L. R. B.***, 309 U. S. 350, 364; ***N. L. R. B.* v. *Express Publishing Company***, 312 U. S. 426, 438; ***N. L. R. B.* v. *Pacific Greyhound Lines, Inc.***, 303 U. S. 272, 275; *N. L. R. B.* v. *J. Greenebaum Tanning Co.*, 110 F. (2d) 984, 988 (C. C. A. 7), cert. denied, 311 U. S. 662; *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265; *N. L. R. B.* v. *Reynolds Wire Company*, 121 F. (2d) 627, 630 (C. C. A. 7); *Wilson & Co., Inc.* v. *N. L. R. B.*, 124 F. (2d) 845, 848 (C. C. A. 7); *N. L. R. B.* v. *Jahn & Ollier Engraving Company*, 123 F. (2d) 589, 592–593 (C. C. A. 7); *N. L. R. B.* v. *Superior Tanning Co.*, 117 F. (2d) 881, 890–892 (C. C. A. 7);

N. L. R. B. v. *Vincennes Steel Corp.*, 117 F. (2d) 169, 171–172 (C. C. A. 7).

E. The Independent was accorded a fair hearing. ***N. L. R. B.* v. *Link-Belt Co.***, 311 U. S. 584, 587; ***Bethlehem Steel Co.* v. *N. L. R. B.***, 120 F. (2d) 641, 653 (App. D. C.); ***United States* v. *General Motors Corp.***, 121 F. (2d) 376, 404–405 (C. C. A. 7); *American Enka Corp.* v. *N. L. R. B.*, 119 F. (2d) 60, 62–63 (C. C. A. 4); *N. L. R. B.* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282, rev'g 116 F. (2d) 350, 356 (C. C. A. 7); *N. L. R. B.* v. *New Era Die Co.*, 118 F. (2d) 500, 505 (C. C. A. 3); *N. L. R. B.* v. *Brown Paper Mill Co., Inc.*, 108 F. (2d) 867, 870–871 (C. C. A. 5) cert. denied, 310 U. S. 651; *Donnelly Garment Company* v. *N. L. R. B.*, 123 F. (2d) 215 (C. C. A. 8); *Bethlehem Shipbuilding Corp.* v. *N. L. R. B.*, 114 F. (2d) 930, 937 (C. C. A. 1).

ARGUMENT

POINT I

The Board's findings of fact are supported by substantial evidence. Upon the facts so found, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1), (2), and (3) of the Act.

A. A condensed view of the facts

1. *The individual contracts*

In 1933, J. M. Olin, a vice-president of the Company (Supp. 516), finding that unionism was, to quote from his testimony, being "agitated throughout the entire [working] force" (Supp. 529), addressed a mass meeting of the East Alton employees and suggested that the employees establish a Works Council Plan like that in effect at the Company's New Haven plant (18; Supp.

530).[6] The employees did not, however, adopt Vice-President Olin's suggestion (18; Supp. 536).

From about 1915 to 1921, the Company followed the practice of having its employees sign individual contracts which assured the employees a bonus of up to 6 percent of their annual earnings provided that they lived up to their terms (18; Supp. 272, 519, Bd. Exh. No. 16–A, Supp. 563–567).[7] In 1921 the Company ceased to offer these contracts to its employees because of the depression (Supp. 272, 519). In 1933, at about the time of Olin's speech to the employees, the Company resumed the practice of offering the individual contracts to its employees, despite the fact that business was at a very low ebb at that time (18; Supp. 272, 519). Its motive for assuming the financial burden which the bonus feature of the contract entailed was to stem the tide of unionism which the passage of the National Industrial Recovery Act had swelled. That such was the Company's purpose for renewing the individual contracts was admitted at the hearing. George Dawson, the personnel manager of the Company (Supp. 249–250), testified that their revival was due, in part, to "industrial unrest" resulting from "unionization" (18; Supp. 273). Vice President Olin likewise testified that their revival was intended to counteract "propaganda" exploiting the National In-

[6] The Plan to which Vice-President Olin referred has since been disestablished pursuant to a stipulation with the Board.

[7] We describe the contract more fully hereinafter and point out that its terms infringe upon rights guaranteed employees by the Act, *infra*, pp. 23–27.

dustrial Recovery Act (19; Supp. 519–520).[8] The Company seeks to avoid these admissions, as found by the Board, by a tortured reading of Dawson's and Olin's testimony and by contending that the evidence fails to show that unionism was being discussed at the time of the revival of the individual contracts (Co. Br. pp. 14–16). Concededly the contracts were revived in July 1933 (Supp. 272); Olin testified that the mass meeting of the employees at which he suggested the formation of a company union occurred "in the summer of 1933" (Supp. 531); that union "agitation" "at that time" [referring to the time of the meeting] (Supp. 530) had aroused the opposition of some of the employees (Supp. 530); and, answering the question: "Was there anything that occurred in that year [1933] that particularly called the use of the [individual] contracts to your attention?" Olin replied: "* * * the only thing I can recall which had any influence upon my mind * * * was the beginning of the N. R. A. process * * * the propaganda which was emanating on that subject; it seemed to me we desired to get a little closer to our employees than we were, than submitting them and subjecting them to all the press propaganda that was coming out on that subject. I might say I have never been an enthusiast in N. R. A. or anything of its ilk" (Supp. 520). This testimony, especially when considered in the context of Olin's

[8] Section 7 (a) of the N. I. R. A., the forerunner of Section 7 of the National Labor Relations Act, provided that employees should have the right to bargain collectively through freely chosen representatives.

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suggestion regarding the formation of a Company union clearly reveals the sophistry of the Company's contention. The Board, therefore, properly found (Supp. 20) that "the purpose" of the Company in reviving the contracts was "to forestall union activity among [the Company's] employees and to create a permanent barrier to union organization among them."

Since 1933, the Company has systematically urged its employees to sign the individual contracts. After 3 months' service, all new employees are either sent to the Personnel Department by their foremen or given notice, repeatedly if necessary, to report there for an interview (19; Supp. 492–495, 506–508). In these interviews, the employees are told, either singly or in groups, of the benefits which the contract provides and are urged to sign the document (19; Supp. 273–274, 493–498, Bd. Exh. No. 14, Supp. 559–560). When a contract is about to expire, the employee is notified, repeatedly if necessary, to report to the contract office for the purpose of signing a renewal (19; Supp. 274, 494–495, 506–508). Although the employees are told that signing the contract is optional, they cannot fail to realize from its liberal bonus feature and the assiduity of the Company in seeking to have them sign the contract that the Company earnestly desires them to do so. It is not surprising, therefore, that virtually all of the employees have signed such contracts.[9]

[9] The assistant to the plant manager, speaking as of April 1941, testified that only four of the thousands of workers then in the Company's employ had expressed an unwillingness to sign an individual contract (Supp. 500–501, Tr. 712–713).

2. The formation of the Independent on the advent of the C. I. O.

From 1933 to 1937, there was no union among the Company's employees, but in the spring of 1937, the C. I. O. launched a membership campaign at the Company's plant (21; Supp. 399, B. A. 23–24, 26, 54, Tr. 202). The Independent was formed to counteract that movement.[10]

Charles Taylor, a machinist, was the principal organizer of the Independent. Before going ahead with its formation, Taylor and his associates decided to find out whether the Company had any objection to the project (21; Supp. 315–319, 323). General Manager Bassett assured Taylor that the Company would not object to the inside union provided that the employees "stayed within their rights," and did not solicit membership on company time and property (21; Supp. 316, 323).[11]

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[10] Illustrative of the management's attitude toward the C. I. O. at this time is the comment which Foreman Robertson made when an employee expressed the opinion that the men needed an "outside" union. Robertson's comment was, "Well, you would get farther with the Company with an independent union" (Supp. 66). How true that statement was is abundantly shown by the events that followed.

[11] Imbued with the Company's intransigent opposition to unions and seemingly unaware that General Manager Bassett had approved the project, Meyers, the superintendent of the machine shop, on hearing of Taylor's endeavor to form the Independent, warned Taylor that he could consider himself discharged if he was "fooling around with a union" (21; Supp. 319–320, 325–327). When Taylor reported this to General Manager Bassett, the latter characterized Superintendent Meyers' remark as "unfortunate," and told Taylor to "go on to work as though nothing happened" (21; Supp. 320, 326–327).

Having secured the Company's permission to proceed, Taylor and his associates quickly perfected the organization of the Independent. On June 4, 1937, they engaged an attorney and launched a membership drive (22; Supp. 299, 319, 362–363, 368–369, B. A. 16–17, Tr. 53). Despite General Manager Bassett's admonition not to solicit on company time and property, the Independent adherents carried on their membership drive during working hours, at times in the presence of foremen. Indeed, since its inception, the Independent has extensively engaged in a variety of activities on company time and property, including the collection of monthly dues and the circulation of petitions for the selection of departmental representatives (22; Supp. 441, B. A. 17–18, 22, 23, 24, 26, 57, 74, Tr. 86, 135, 182, 191, 231–232, 279, 288–290). Yet the Company has never, so far as the record shows, voiced any objection to the use of its time and property for these purposes.[12]

3. The acceptance by the Independent of the Company's demand that bargaining be subordinate to, and not in conflict with, the individual contracts

On June 25, 1937, Otis Sullivan, the temporary secretary-treasurer[13] of the Independent, delivered a letter to Vice President Olin in which the Independent stated that it represented a majority of the employees and requested recognition (22; Supp. 295–296, 308–309,

[12] In the light of these facts, it is idle for the Company to contend, as it does (Co. Br., p. 28), that it "had nothing whatsoever to do with the formation of the Independent."

[13] Subsequently, Sullivan became the permanent secretary-treasurer of the Independent and the Company granted him a year's leave of absence without pay to enable him to devote his full time to the affairs of the Independent (22; Supp. 284–286).

Resp. Exh. No. 26, Supp. 575–576). Olin informed Sullivan that in dealing with the Independent the Company would do nothing that would jeopardize the individual contracts with its employees (22; Supp. 532–533, Resp. Exh. No. 27, Supp. 576–577).

On July 26, 1937, after its formal organization had been completed, the Independent submitted a proposed working agreement to the Company, covering hours, wages, and other conditions of employment (23; Bd. Exh. No. 9, Supp. 550–552, Tr. 73). On August 10, the parties met; the attorney for the Company submitted at this time a so-called "basic agreement" to the Independent representatives (23; Supp. 306–308, B. A. 19–20, Bd. Exh. No. 10, Supp. 553–554). This contract consisted of three clauses: the first recognized the Independent as the statutory bargaining agent of the Company's employees, but only "with respect to all matters not covered by the contracts of employment between the Company and those of its employees who have made them" (24; Bd. Exh. No. 10, Supp. 553); the second clause declared that "neither the Company nor the [Independent] admit or assert any right to change said contracts of employment without the consent of the parties thereto" (*ibid.*), but it went on to provide that if the parties should from time to time agree that a modification of the individual contract was desirable, the proposed change would be "recommended" to the employees; and the third clause of the "basic agreement" provided that the contract should remain in force for 1 year and thereafter until termi-

nated by a prescribed written natice.[14] The executive board of the Independent at first rejected the "basic agreement," but later reversed its position on being told by its attorney that the Company would negotiate no further with the Independent until the "basic agreement" was signed (24; B. A. 18–21). The "basic agreement" was executed on August 12, 1937 (24; B. A. 18, Bd. Exh. No. 10, Sup. 553–554, Tr. 93).

In complete disregard of this evidence, the Company has the temerity to argue: "It should be noted that * * * one of the things which concerned the employees themselves, *and not the company,* was the possible effect of the union [i. e., the Independent] upon their individual contracts" (Co. Br. p. 30; emphasis supplied). That the employees desired to retain the attractive bonus feature of the individual contracts—even at the expense of a renunciation of their rights

[14] Vice President Olin, following his talk with Sullivan of June 25 (*supra*, pp. 12–13), wrote a letter to the attorney for the Company, in which he defined the position which the Company would insist upon in dealing with the Independent (22–23; Resp. Exh. No. 27, Supp. 576–579). In part this letter was as follows:

"[The Company's] position must necessarily be that it is our desire to protect and to continue the constitutional rights of the employee as an individual and the Company as a corporate identity to enter into a contract such as now exists, and that we must ask that this contract be recognized and that all acts take due recognition of the existence of that contract, and that if any action is taken which tends to modify, alter, or amend the individual relationship or nature of the contract then that change should be reflected in the individual contracts. The determination must be made eventually as to how far we can go in collective bargaining and other relationship with [the Independent] and at the same time preserve the legal rights and position under the individual contract * * *" (Resp. Exh. No. 27, Supp. 578).

under the Act—is not to be wondered at. But to assert, as the Company does, that the Company was not itself concerned with the perpetuation of the individual contract, is, in the face of the record, utterly preposterous.

4. The Company's attempt to bolster up the Independent as a buffer against the A. F. of L.

From 1937 until December 1940 the sway of the Independent over the Company's employees was not challenged by an outside union, and the *modus vivendi* established by the "basic agreement" and the individual contracts was not disturbed. Despite the absence of competition, however, the membership of the Independent began to decline in the latter part of 1940 (25; Supp. 55–56). The security of its position was, moreover, threatened at this time by the appearance of the A. F. of L. (26; Supp. 53). To meet this threat, the executive committee of the Independent appealed to the Company for aid (25–26; Supp. 55–57, 61–62). Responding to this appeal, General Manager Bassett, in the presence of other company executives, informed the chairman and the secretary-treasurer of the Independent that the board of directors of the Company had authorized a wage bonus of 2 percent to be given the signers of the individual contracts, and, Bassett continued, if a notice was posted crediting the Independent with having secured the bonus, the notice would "bring the [Independent's] membership up, showing that the union was trying to do something for members in the union * * *" (26; Supp. 55–59, 61–64). Needless to say, the Independent eagerly fell in with the suggestion; its officers drafted the notice and posted it on the

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plant bulletin board the day following this conference (26; Supp. 59, 63, 282–284).[15]

In January 1941 the A. F. of L. membership campaign got under way; on January 31, a mass meeting was held at which a large number of the employees signed A. F. of L. membership applications; on February 5, Local 22574 was chartered with jurisdiction over employees in the smokeless powder division (27; Supp. 53, B. A. 10). On March 13, 1941, Local 22574 asked the Company for recognition in the smokeless powder division, offering to submit its membership cards in proof of its majority status (27; B. A. 10–12). The Company denied that request, contending that the unit was inappropriate (27; B. A. 12). On March 25, Local 22574 filed a petition with the Board, requesting certification in the smokeless powder division (27; B. A. 12). On June 13, 1941, following an election, the Board certified Local 22574 as the exclusive bargaining representative in that division (33; Bd. Exh. Nos. 3–B, 3–E, B. A. 98–105, 109–110).[16]

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[15] The Company has taken great pains to make it appear that Dawson rather than Bassett made the statement quoted above (Co. Br. pp. 40–44). But the point of the incident is that the Independent was allowed falsely to claim credit for the bonus in the bulletin board notice. That its representatives had asked the management for aid in building up its declining membership and that the bulletin-board notice was posted following the conversation above described are not disputed. Nor is it true, as the Company asserts (Co. Br. p. 44) that Dawson "positively and unequivocally denied" the aforesaid statement. Dawson, when asked about the remark, testified merely that he could not recall making such a statement (Supp. 283).

[16] The Company remonstrated with the Independent representatives for not intervening in the representation proceeding for the

Throughout this period and especially after the A. F. of L. had extended its membership campaign to the Western Side,[17] the Company engaged in varied coercive measures to keep the employees from joining the A. F. of L. Thomas Wortz, the superintendent of the smokeless powder division, sent for Bunzy, the president of Local 22574, when the A. F. of L. organizing campaign was in progress, and on opening the conversation remarked: "I expected a rough sort of a fellow—being mixed up with a union like you are" (29; B. A. 25–27, 82, 92). Superintendent Wortz then told Bunzy that he could "go places" with the Company if he would "make [himself] right with them," to which Wortz added the clarifying statement that he would send Bunzy to a training school for foremen (29; B. A. 27, Supp. 172–173). Wortz went on to say that the employees should deal with the Company through a "committee," and a "union of [their] own," instead of going over to East St. Louis and get[ting] a pot-bellied racketeer" to represent them (29; B. A. 27–28). He closed the conversation with the assertions that Local 22574

purpose of opposing the unit contention of the A. F. of L. union, even though the Independent had disclaimed any interest in the question because of its negligible membership among the employees in the smokeless powder division (32; B. A. 30–35). Dawson, the personnel manager, in urging the Independent to intervene, told Jones, a departmental representative of the Independent, he "realized that we have not accomplished everything we think we should have," but, Dawson continued, there were "great possibilities there to make a go" of the Independent (32; B. A. 32).

[17] This occurred in April or May 1941; Local 333 was chartered in August of that year with jurisdiction over the casting shop, the brass mill, and other departments on the Western Side (B. A. 13–14, Tr. 45).

was "no good" and that it was made up of "a bunch of guys" who were "bosses and wouldn't work," men who, he added, "lived off the wages of employees paid out in union dues" (29; B. A. 27, 28). Superintendent Wortz used like tactics in trying to induce Gent and McPherson, two other subordinates, to resign from Local 22574 (29–30; B. A. 41–43).

Other supervisors followed Wortz's example in opposing the outside union. Thus, Foreman Pivoda told a member of Local 22574 to "lay low on union talk" because, he said, the Company had spotters in the plant (30; B. A. 78–79, Supp. 483–486). Foreman Pivoda told another employee that Superintendent Wortz had ordered him to "break up" the union sentiment of two of his men (30; B. A. 22, Supp. 54). Foremen Arnold and Monical urged an employee to resign from Local 22574; the latter reinforced his plea by asking the employee whether the Company or the A. F. of L. "could do the most for him" (30; B. A. 74–76). Another foreman, named Canhan, in talking with an employee named Wildt, argued against membership in the outside union by adverting to the experience of his brother-in-law who assertedly had been out of work for 6 months because of a strike. Canhan concluded the talk by saying that Wildt's welfare would be better served by keeping his individual contract than by joining a union and losing that contract (31; B. A. 45–48). Foreman Schindel assured another employee that he would "get ahead around here" if he opposed the outside union, and warned the man that the Company might remove its plant rather than deal with a union which it opposed (31–32; B. A. 79–80, Supp. 86–88, 477–479).

The coercive tactics described above were supplemented by measures designed to strengthen the Independent. We have already noted the wage bonus which the Company falsely credited to the Independent (*supra*, pp. 15–16). In March 1941, when the contest for supremacy between the Independent and the A. F. of L. was well under way, Superintendent Day and his assistant, McCauley, repeatedly prodded William Elliott, the departmental representative of the Independent in the casting department, to be more aggressive in pressing grievances (27–28; B. A. 54, 55–56, 60–61, Supp. 91, 545–546). Day told Elliott that he saw no reason why "the Independent Union couldn't be made to work," adding that he counted on Elliott to help him in attaining that objective (28; B. A. 55–56).[18] To allay dissatisfaction with wages and working conditions then rife in Elliott's department, the Company entered into a working agreement with the Independent, granting higher wages and improved conditions in that depart-

[18] When this prodding failed of its desired effect, Superintendent Day bluntly told Elliott either to become more active in pressing grievances or to resign his Independent post (28; Supp. 545–546). Elliott withdrew from the Independent after this incident, and was discharged soon thereafter (*infra*, pp. 31–32). We later point out, in showing that Elliott was a victim of discrimination, that Superintendent Day admitted at the hearing that Elliott's apathy as a departmental representative of the Independent was a contributing cause for his dismissal (*infra*, pp. 32, 33). In seeking to explain this admission, Superintendent Day added that Elliott's apathy towards the Independent "tended to indicate his attitude toward the Company" (28–29; Supp. 95–96). The only inference that can be drawn from this statement is that Superintendent Day considered the interests of the Company and of the Independent to be identical.

ment (27; Supp. 91–92, 110–114, 116–117, Bd. Exh. No. 15, Supp. 561–562). The timing of these concessions, relative to the A. F. of L. bid for support among these employees, is a clear indication of the Company's desire to prevent the outside union from gaining a foothold in the plant.

After Local 22574 had won the Board election, held on May 26, 1941, the Company disregarding the Board's unit determination respecting the smokeless powder division and the election victory of Local 22574, entered into a working agreement with the Independent on June 4, 1941, reaffirming the grant of recognition to the Independent as bargaining agent for *all* employees in the plant (32; Supp. 72–73, Bd. Exh. No. 13, B. A. 132–139, 35–36, 52).[19] The contract declared that it should not be deemed to amend in any way the individual contracts and expressly confirmed the "basic agreement" (*ibid.*).[20] On June 13, 1941, the Company declined to recognize Local 22574, notwithstanding that the Board had certified it, contending that the Board's unit determination was erroneous and that its June 4, 1941, agree-

[19] The Company's purpose to force the Independent upon its employees is revealed by the fact that it entered into this contract, not only knowing of the right to exclusive recognition of Local 22574 in the smokeless-powder division, but even without asking the Independent for evidence that it represented a majority in the plant-wide unit. This recognition was granted despite the fact that 4 years had elapsed since the Independent had, assertedly, satisfied the Company of its majority (33; B. A. 36, 52).

[20] It should also be noted that Section 9 of the June 4 contract restricted vacations with pay to employees "who have a written Employment Contract with the Employer" (33; B. A. 128).

ment with the Independent precluded such recognition (33; Bd. Exh. No. 3–D, B. A. 107–108).

About July 8, 1941, the Company incorporated the East Alton Manufacturing Company, a Maryland corporation, which took over the operation of the smokeless powder division (33; B. A. 9–10, Supp. 9–10). On August 2, after the intercession of the National Defense Mediation Board, predecessor of the National War Labor Board, the new corporation entered into a collective agreement with Local 22574, providing, among other things, that the individual contracts between the Company and some 423 employees of the smokeless powder division should not be assigned to the new company, and that like contracts should not in the future be offered the employees of that division (33–34; Bd. Exh. Nos. 3–K, 3–L, 24, B. A. 117–127, 147–165).

B. The respects in which the Company's conduct violated Section 8 (1) and (2) of the Act

1. Interference with employee rights by anti-union statements of company officials and foremen

The duty of an employer in the presence of union rivalry is epitomized in this Court's statement that he must observe "the utmost of honesty neutrality" (*Valley Mould & Iron Corp.* v. *N. L. R. B.*, 116 F. (2d) 760, 764). The conduct of the Company fell far short of that standard. Its officials and foremen urged employees to support the Independent, buttressing their plea with promises of preferment (*supra*, p. 11, note 10, 17, 18); Superintendent Wortz vilified leaders of the A. F. of L. union as a venal, corrupt body of parasites and disparaged the Union itself as "no good" (*supra*,

pp. 17–18); his foremen followed his example by urging subordinates to withdraw from the A. F. of L., coupling these appeals at times with assurances of rewards for compliance (*supra,* p. 18); one foreman implemented his attempt to dissuade an employee from suporting the A. F. of L. by saying that the company had labor spies in its employ (*supra,* p. 18); another intimated that the Company might remove its plant if the outside union succeeded in organizing the employees (*supra,* p. 18). This intimidation constituted a flagrant violation of Section 8 (1) of the Act, and the Board properly so found. Cf. *H. J. Heinz Company* v. *N. L. R. B.,* 311 U. S. 514, 518; *Valley Mould & Iron Corp* v. *N. L. R. B.,* 116 F. (2d) 760, 762–764 (C. C. A. 7), cert. denied, 313 U. S. 590; *Rapid Roller Co.* v. *N. L. R. B.,* 126 F. (2d) 452, 456–457 (C. C. A. 7), cert denied, 63 S. Ct. 45. In the face of this clear showing of interference and in bland disregard both of the Company's assistance to the Independent and discouragement of membership in the outside unions (*supra,* pp. 15–21), the Company argues in its brief (at p. 12) that "there is an utter absence of any evidence of any of those facts which are so commonly found to accompany anti-labor policies and company domination of unaffiliated unions." Not content, however, to rely upon this assertion, the Company devotes pages of its brief to a discussion of the Board's findings of intimidation in an effort to have it appear that the intimidation was innocuous. (See pp. 47–51, 55–61 of the Company's brief.) Woven into the fabric of the Company's contention is the specious argument that the intimidatory utterances

were not successful in dissuading the employees from joining the outside unions. In rejecting this argument this Court has recently said:

> It is argued by the Company that because the employees joined the Union almost one hundred percent, therefore the evidence of duress and the effectiveness of the duress had not been shown. In the first place, it is not necessary to show duress but only interference, and it is not necessary that the interference shall be successful in preventing organization. It is only necessary to show that the employer interfered, intimidated, or coerced. It is the purpose of the statute to see that the employer does not interfere or intrude into the affairs of the employees.

Rapid Roller Co. v. *N. L. R. B.*, 126 F. (2d) 452, 457, cert. denied 63 S. Ct. 45.

2. The individual contracts

Three separate considerations support the Board's finding that the Company interfered with its employees' right to self-organization "by urging and persuading [them] to sign the individual contracts of employment" (Supp. 21) after the Act went into effect.

First, the evidence shows, as the Board found (Supp. 20), that the Company renewed its practice of having employees sign such contracts with the deliberate purpose of keeping its workers unorganized (*supra*, pp. 7–10). Witness to this is the testimony of its own officials, and Vice President Olin's attempt, contemporaneously with the reintroduction of the individual contracts, to divert the organizational desires of the employees into channels acceptable to the Company

(*supra,* pp. 7–10). The bonus feature of the contract, like the profit-sharing scheme in *N. L. R. B.* v. *Jahn & Ollier Engraving Co.,* 123 F. (2d) 589, 592 (C. C. A. 7), was "so favorable that little difficulty was experienced in procuring signatures." Interference is no less interference because it is accomplished through allurement rather than coercion. When, as here, the system of individual contracts was deliberately employed to stem a tide of organization and was thereafter used as a buffer against legitimate unions, it necessarily falls within the prohibition of interference contained in Section 8 (1) of the Act. Here, as in *National Licorice Company* v. *N. L. R. B.,* 309 U. S. 350, a system of individual contracts was "the means adopted to 'eliminate' [outside unions] * * *" as collective bargaining agents of the company's employees. The use of individual contracts for such a purpose is, as this Court has repeatedly held, a clear violation of the Act. *N. L. R. B.* v. *Jahn & Ollier Engraving Co.,* 123 F. (2d) 589, 592–593; *N. L. R. B.* v. *Superior Tanning Co.,* 117 F. (2d) 881, 890–892, cert. denied, 313 U. S. 559; *N. L. R. B.* v. *Vincennes Steel Corp.,* 117 F. (2d) 169, 171–172; *N. L. R. B.* v. *Bear Brand Hosiery Co.,* 11 L. R. R. 453, decided November 27, 1942.

A second and independent ground for the Board's finding with respect to the individual contracts is that their terms renounce rights guaranteed employees by the Act. The contract is for a fixed term, either 6 months or 1 year, and obligates the employee to devote his full time throughout that term to the business of the Company (Bd. Exh. No. 16–A, Supp. 563–567, par. 3);

breach of that undertaking entails, at the option of the Company, his "immediate suspension or dismissal" (*ibid.*, par. 4); its faithful performance is, moreover, made a condition precedent to the employee's receiving the bonus stipulated for in paragraph 6 of the contract. The obligation to pay the bonus is hedged about with the further condition that "the employee continue in the employ of the Company for the entire period of this contract" (*ibid.*, par. 8). The contract also provides that the Company may terminate it, in the event of "the non-operation, or the material curtailment of the operations, of the plant * * * due to * * * strikes * * *" (*ibid.*, par. 9). The employee in such case forfeits the bonus plus any sum which the Company has deducted from his wages pursuant to the contract if the contingency resulting in the shut-down or curtailment is due "to the fault of the Employee" (*ibid.*, par. 9). The effect of this contract, as the Board found (Supp. 19–20), is to give the Company "the right to terminate the employment of any employee who participate[s] in a strike or any other concerted activity regarded as interfering with his 'faithfully' fulfilling 'all his obligations,' and to deprive any such employee of his bonus." Consequently, the Board went on to say, "A premimum [is] thus placed by the [Company] on an employee's refusing to engage in concerted activities with his fellow employees, and the full weight of the [Company's] approval [is] used in persuading employees individually to accept this restriction on their rights under the Act" (Supp. 20). The contracts here involved, like those under consideration in the *National Licorice* case, "by

their terms," therefore, impose "illegal restraints upon the employees' rights to organize and bargain collectively guaranteed by Sections 7 and 8 of the Act." *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 359–360. (See also the decisions of this Court cited at p. 24, *supra*, and *N. L. R. B.* v. *Stone*, 125 F. (2d) 752, 754, 756 (C. C. A. 7), cert. denied, 63 S. Ct. 44.)

The Company's disingenuous assertion (Co. Br. p. 18) that the contracting employee is as free to strike or engage in concerted activity after signing the contract as before is foreclosed by the *Jahn & Ollier* decision.[21] The individual contract there under consideration is indistinguishable from the one here involved. There, as here, the employer contended that the contract did not infringe the employee's right to strike. (See Brief for respondent, *Jahn & Ollier Engraving Co.*, pp. 6–8, Cause No. 7261, Oct. 1941 Term.) But this Court rejected that specious contention, pointing out that "the contract is not to be distinguished in kind and effect, but only in degree, from that in *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, * * *" (123 F. (2d), at p. 593).[22] The Independent, moreover, unlike the Com-

[21] It need hardly be said that an agreement not to strike entered into with a freely chosen bargaining representative does not violate the Act. The vice in the contracts in the present case is that they imposed that restriction on *individual* employees. See *Matter of Arcade-Sunshine Company, Inc.* and *Laundry Workers, Cleaners, & Dyers Union*, 12 N. L. R. B. 259, 264–265, enforced in 118 F. (2d) 49 (App. D. C.), cert. denied, 313 U. S. 567.

[22] The sincerity of the Company in urging this argument is impugned by the fact that Vice President Olin considered the individual contract as preventing strikes by outside unions. This is clearly inferable from his statement, which is recorded in the min-

pany, concedes that (Ind. Br. p. 38): "the [individual] contract provides that if an employee working under it starts or instigates a strike, which results in disruption or material curtailment of [plant] operations, that employee will not be paid a bonus." The Company's further assertion that if the individual contract infringes on employee rights under the Act, "then it is difficult to see how any individual contract can be valid" (Co. Br. p. 18) is plainly frivolous.

The individual contracts are invalid for still another reason, namely, that under the "basic agreement" with the Independent the individual contract was the definitive instrument to which all understandings arrived at in negotiations with the Independent were to be reduced. The individual contracts were, therefore, an integral part of the bargaining relationship between the Company and the Independent. Since, as we later point out (*infra*, pp. 27–31), the Independent was a company-dominated union, the abrogation of the individual contracts is required to make effective the cease and desist and disestablishment order relating to the Independent. Cf. *N. L. R. B.* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 275; *N. L. R. B.* v. *J. Greenebaum Tanning Co.*, 110 F. (2d) 984, 988 (C. C. A. 7); cert. denied, 311 U. S. 662.

3. Domination of the Independent

The Company's dealings with its employees, as heretofore recounted, disclose an unswerving purpose to

utes of the Independent and was not disputed at the hearing, "that an injunction could be secured if any action was taken *by outside parties* which would imperil present satisfactory operations of these contracts (Supp. 259–260, 271–272).

repel outside unions, a purpose effectuated by intimidation, allurement, and support of the Independent. These measures not only discouraged membership in outside unions, but they also created a highly favorable environment for the growth of an organization not handicapped by employer disfavor. This Court has emphasized the importance of such support, in speaking of a union which the Board found to be company-dominated, when it said that "standing alone" the evidence of domination was "not of a convincing nature, but taken in connection with [the employer's] attitude toward outside unions [it was] sufficient." *Reliance Mfg. Co.* v. *N. L. R. B.*, 125 F. (2d) 311, 314. To like effect are *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 597–600; *N. L. R. B.* v. *Eclipse Moulded Products Co.*, 126 F. (2d) 576, 578 (C. C. A. 7); *N. L. R. B.* v. *Aluminum Products Co.*, 120 F. (2d) 567, 571 (C. C. A. 7); *N. L. R. B.* v. *Auburn Foundry, Inc.*, 119 F. (2d) 331, 334–335 (C. C. A. 7).

The uncompromising opposition of the Company toward the outside unions (*supra*, pp. 17–18) enhances immeasurably the illegal favors bestowed upon the Independent. "Known hostility to one union," said the Supreme Court, "and clear discrimination against it may indeed make seemingly trivial intimations of preference for another union powerful assistance for it" (*International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 78). The favors granted the Independent were, however, far from "trivial": they included (1) an attempt to bolster up its membership by falsely crediting it with having obtained a bonus that the Com-

pany had unilaterally decided to give its employees (*supra,* pp. 15–16; Cf. *Western Union Telegraph Co.* v. *N. L. R. B.,* 113 F. (2d) 992, 995 (C. C. A. 2)); (2) the free use of company time, property, and facilities in carrying on Independent affairs (*supra,* p. 12); and (3) the reaffirmation of exclusive recognition to the Independent for the entire plant after Local 22574 had established its right to represent the smokeless powder division in proceedings before the Board (*supra,* p. 20).[23]

And, finally, as the Board has pointed out (Supp. 36), the Company "made acceptance of the individual contracts a condition precedent to bargaining with the Independent. The condition was merely accepted by the Independent, and its acquiescence demonstrated its complete subservience to the [Company] and its inability to act as a true bargaining representative for the employees. Without obtaining any agreement as to wages, hours or other working conditions of advantage to the employees, the Independent, in effect, relinquished the right to strike, endorsed the individual contracts, and acknowledged that the contracts were paramount to the guarantee of collective bargaining contained in the Act. We do not believe that a *bona fide* labor organization, not dominated by the [Company] would

[23] Such favoritism in regard to recognition has long been an earmark of employer support. Cf. *N. L. R. B.* v. *Bradford Dyeing Ass'n,* 310 U. S. 318, 336–338; *N. L. R. B.* v. *Falk Corp.,* 308 U. S. 453, 461; *Colorado Fuel & Iron Corp.* v. *N. L. R. B.,* 121 F. (2d) 165, 175 (C. C. A. 10); *idem,* on contempt, based upon recognition of a successor to the dominated union, 10 L. R. R. 553, decided June 8, 1942; *N. L. R. B.* v. *Texas Mining & Smelting Co.,* 117 F. (2d) 86, 88–89 (C. C. A. 5).

thus have joined with the [Company] in attempting to deprive its employees of their rights under the Act."[24] In seeking to impeach this finding, the Company contends: "This finding of the Board, if upheld by the Courts, would in effect write into the law a provision that a Company and a union, in arriving at an agreement as a result of collective bargaining, must embody such agreement in [a] formal document or run the risk of the union being charged with company domination" (Co. Br., p. 36). The subserviency to which the Board adverts was not, however, the absence of a "formal document" as a memorial of collective bargaining, but rather the absence of a genuine collective agreement and the gratuitous surrender by the Independent of the employees' rights under the Act.

The assertion (Co. Br. p. 33–35) that the "basic agreement" is a genuine collective bargaining contract, such as the Act contemplates, is incorrect. The "basic agreement," by restricting recognition of the Independent to matters not covered by the individual contract, and by withholding contractual force from understandings reached with the Independent unless the understandings were made part of the individual contract, rendered genuine collective bargaining impossible. In the first place, the grant of full and unconditional recognition to an accredited bargaining representative is a fundamental prerequisite to collective bargaining under the Act. *McQuay-Norris Mfg.*

[24] The A. F. of L. union, it should be noted, insisted upon the elimination of the individual contract as its first bargaining step (*supra*, p. 21).

Co. v. *N. L. R. B.*, 116 F. (2d) 748 (C. C. A. 7), cert. denied, 313 U. S. 565. By its very terms, the "basic agreement" repudiated that obligation. Furthermore, the signing of a written contract with the accredited union embodying a wage and hour agreement is the final step in the bargaining procedure contemplated by the Act. *H. J. Heinz* v. *N. L. R. B.*, 311 U. S. 514, 522–523. Again, by its very terms, the "basic agreement" repudiated that obligation. Thus, the "basic agreement" violates the fundamental requirements of the Act.

In sum: the facts conclusively establish, as the Board found (Supp. 38), that the Company dominated and contributed support to the Independent in violation of Section 8 (1) and (2) of the Act.

C. The discharge of Elliott in violation of Section 8 (3) and (1) of the Act

William Elliott, a machinist, entered the employ of the Company in 1925 (39; B. A. 54); his last period of employment continued from 1930 until July 25, 1941, when he was discharged, allegedly for having continually criticized the management. The Board found that the Company's explanation for his dismissal was a pretext designed to conceal the unlawful motive for his discharge (Supp. 42–43).

Elliott was, concededly, a good workman during the many years that he was in the Company's employ (Supp. 102, 134–135, B. A. 64–65). In 1941, Elliott became the representative of the Independent in the casting shop (39; B. A. 55). In the spring of 1941, when the A. F. of L. was waging its organizing campaign

(*supra*, p. 16), Superintendent Day and Supervisor McCauley chided Elliott for not being more aggressive in discharging his duties as such representative; these admonitions culminated, as has been noted (*supra*, p. 19), in Superintendent Day's statement to Elliott that he should either become more aggressive as an Independent representative or resign the post (*supra*, p. 19, note 18). Elliott resigned from the Independent following this episode and, in July 1941, joined the A. F. of L. (27–29, 39; B. A. 56–57, 67). On July 23, 1941, he was elected financial secretary of Local 333, the A. F. of L. local union which was chartered to represent employees in departments of the Western Side (39; B. A. 13, 57).[25] His election to office in Local 333 immediately became known to the supervisors of the casting shop (39; B. A. 68–69, 71–72). His dismissal occurred on July 25—2 days after that event.[26] Superintendent Day admitted at the hearing that Elliott's discharge was in part motivated by his failure to represent the Independent in a manner satisfactory to the Company (*supra*, note 18, p. 19).

The Company's explanation for Elliott's discharge, as the Board found, was patently implausible. The chief complaint against Elliott was that he had from time to time voiced criticism of the management regarding the administration of a bonus system. But the bo-

[25] See note 17, *supra*, p. 17.

[26] It is not without significance that Mrs. Elliott, who was employed in the brass-mill office, was also discharged on July 25, 1941. Conflicting explanations for her discharge were given by the Company's representatives at the Board hearing (B. A. 90–91, Supp. 546–547). Through the intercession of the Board's Regional Director, Mrs. Elliott was reinstated about a week after her discharge (40–41; Supp. 547–549; B. A. 95).

nus system which was the subject of his criticism had been discontinued long prior to his dismissal; consequently Elliott's grievance on that score was of no practical moment (Supp. 125, 203–204, Tr. 505–511). Moreover, his views on that subject were known to the management and tolerated by it for years prior to his dismissal (42; Supp. 91–93, Tr. 506–507). The resurrection of this matter is significant of how difficult it was for the Company to discover a pretext for Elliott's discharge.

The incident which, assertedly, precipitated Elliott's discharge was his disapproval of a proposed change in shift schedules. But admittedly, Elliott stated his views at the express invitation of the management (39; Supp. 107–109, 124–125, 152–153, B. A. 57–60, 88–90). Before instituting the proposed change in schedule, the Company had its foremen poll the employees on whether or not they favored the change (39; Supp. 146, 152–153, B. A. 89). When Foreman Terry invited Elliott to express his opinion, Elliott said that he opposed the change because it would cause the employees a monetary loss (39; B. A. 57–58, 88). His views were reported to Superintendent Day; after receiving that report Day sent for Elliott and discharged him. When Elliott asked Day why he was being dismissed, Day adverted to the Independent saying: "You stuck me in the back, and let me down" (40; Supp. 107–109, 142–145, B. A. 61–62).

In these circumstances, and especially in view of Superintendent Day's admission that Elliott's apathy as an Independent representative was a contributing

cause for his discharge, the Board could reasonably find, as it did, "that [the Company] knew and accepted Elliott as an outspoken and critical employee and expressed no disapproval of his critical attitude until he abandoned the Independent and became active in Local 333" (Supp. 42). Accordingly, the Board was warranted in finding that "Elliott's critical attitude was used by the [Company] as a pretext" to conceal the fact that he "was discharged * * * because of his withdrawal from the Independent and because of his membership in and activity on behalf of Local 333" (*ibid.*). Cf. *N. L. R. B.* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105; *New York Handkerchief Mfg. Co.* v. *N. L. R. B.*, 114 F. (2d) 144, 147 (C. C. A. 7), cert. denied 311 U. S. 704; *N. L. R. B.* v. *Chicago Apparatus Co.*, 116 F. (2d) 753, 759 (C. C. A. 7).

Point II

The Independent was accorded a fair hearing

The Independent complains (Ind. Br. p. 22) of the exclusion of testimony as to why its members joined the organization. It is important to note the precise character of the ruling. The Trial Examiner allowed the parties to examine any witness who participated in the organization of the Independent as to his reasons for joining the Independent (Supp. 404–405, 458). But in order to keep the hearing within reasonable bounds, the Examiner refused to permit the calling of several thousand employees, who joined the Independent after its formation, for the purpose of having them testify to their reasons for joining the organization.

In so ruling, the Examiner stated: "It certainly would be highly cumulative and put an impossible burden upon the Trial Examiner and the Board here to ask two thousand or possibly more witnesses [to be called for that purpose]" (Supp. 458). We submit that the ruling of the Examiner was a proper exercise of his discretion. To receive this cumulative testimony would have prolonged the hearing beyond all reasonable bounds.

Furthermore, testimony of this subjective character is notoriously unreliable—particularly when elicited in the presence of an employer who has demonstrated a bias in favor of one of competing labor organizations; and, in any event, cannot overcome positive, specific evidence of interference, domination, and support in violation of the Act. Compare *United States* v. *General Motors Corp.*, 121 F. (2d) 376, 404–405 (C. C. A. 7), cert. denied, 314 U. S. 618; *Bethlehem Steel Co.* v. *N. L. R. B.*, 120 F. (2d) 641, 653 (App. D. C.). In *Bethlehem Shipbuilding Corp.* v. *N. L. R. B.*, 114 F. (2d) 930, 937, the Circuit Court of Appeals for the First Circuit overruled the contention that freedom from employer domination was shown by testimony of employee representatives under the representation plan found to be company dominated that they were "under no sense of constraint." The Court pointed out that "recognition of constraint" is "a subtle thing" and calls "for a high degree of introspective perception." Similarly, the Fourth Circuit declared "uncontradicted testimony of a large number of employees to the effect that they were free from coercion by the Company in voting

for representatives on the committees [of the organization found to be dominated] and that the committees were free of coercion . . . and . . . that . . . a large majority of the employees voted in favor of [a continuance of] the existing method of employee representation" can not "avail respondent," because, "seldom does the domination and interference with employee representation . . . take the form of threats or coercion." "More often," the Court went on to say, "it is to be found in the guise of friendly cooperation. . . ." *American Enka Corp.* v. *N. L. R. B.*, 119 F. (2d) 60, 62–63 (C. C. A. 4). In short, as the Supreme Court has said, "It would indeed be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice [of competing unions]. Normally, the conclusion that their choice was restrained by the employer's interference must of necessity be based on the existence of conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates." *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 588.[27] Considering therefore that the rejected testimony was cumulative, that receiving the evidence would have unreasonably prolonged the hearing, that the proffered testimony would be entitled

[27] See also *N. L. R. B.* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282, rev'g 116 F. (2d) 350, 356 (C. C. A. 7); *N. L. R. B.* v. *New Era Die Co.*, 118 F. (2d) 500, 505 (C. C. A. 3); *N. L. R. B.* v. *Brown Paper Mill Co., Inc.*, 108 F. (2d) 867, 870–871 (C. C. A. 5), cert. denied, 310 U. S. 651.

to little weight when viewed against the cogent, specific evidence of employer interference in this case, the Examiner's ruling was plainly not an abuse of discretion.

The only authority upon which the Independent relies in assailing the ruling is *Donnelly Garment Company* v. *N. L. R. B.*, 123 F. (2d) 215 (C. C. A. 8). In the *Donnelly* case, however, the Court explicitly recognized that cumulative evidence may properly be excluded; this is implicit in the Court's statement that, "There were available to [the Trial Examiner] well-known expedients for limiting the number of witnesses where their testimony was *cumulative*" (123 F. (2d), at p. 222 (italics supplied)). Furthermore, the evidence excluded in the *Donnelly* case (contained in an offer of proof constituting a document of 23 pages) included a great variety of facts bearing upon the domination issue, in addition to the subjective evaluation by the employees of their reasons for joining the union alleged to be dominated. But if our interpretation of the *Donnelly* case is incorrect, then, we submit, the decision conflicts with the holdings of the Supreme Court noted above, as well as with the decisions of the circuit courts of appeals to which reference has been made.

Point III

The Board's order is valid

The cease and desist provisions of the Board's order are mandatory under Section 10 (c) of the Act. *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265. Paragraph 1 (f) of the order (Supp. 49), requiring the Company to cease and desist from

"in any other manner" interfering with the exercise by its employees of the rights guaranteed by Section 7 of the Act, is a proper safeguard against the "threat of continuing and varying efforts to attain the same end in the future" which is implicit in its past misconduct. *N. L. R. B.* v. ***Express Publishing Co.,*** 312 U. S. 426, 438; *N. L. R. B.* v. ***Reynolds Wire Co.,*** 121 F. (2d) 627, 630 (C. C. A. 7); ***Wilson & Co., Inc.*** v. *N. L. R. B.,* 124 F. (2d) 845, 848 (C. C. A. 7).

Paragraph 1 (a) and 2 (d) of the Board's order, directing the Company to cease giving effect to the individual contracts found to violate the Act (without prejudice, however, to the assertion by the employees of any legal rights they may have acquired under such contracts) and to notify its employees that it will not enforce the contracts, or in future require such contracts to be executed, are in conformity with the order approved in ***National Licorice Co.*** v. *N. L. R. B.,* 309 U. S. 350, 364, 367, and with the orders which this Court enforced in the ***Jahn & Ollier Engraving Co., Superior Tanning, Stone,*** and ***Vincennes Steel Corp.*** cases, *supra* p. 24.[28]

The propriety of the requirements (1) that the Company disestablish the Independent and cease giving effect to its agreements with the Independent;[29] (2) that it offer reinstatement with back pay to William

[28] The order respecting the individual contracts is also valid under the authorities cited at p. 27, *supra.*

[29] The Board's decision provides, however, that nothing in the order should be taken to require the Company "to vary those wage, hour, and other substantive features of its relations with the employees, themselves, which the respondent has established in the performance of such agreements" (Supp. 46).

Elliott; and (3) that it post appropriate notices is well established. See the *Reynolds Wire Co.* and *Wilson & Co., Inc.*, cases, *supra*, p. 38.

CONCLUSION

It is respectfully submitted that the findings of the Board are supported by substantial evidence, that the Board's order is valid, and that a decree should issue denying the petitions to review, and enforcing the Board's order in full.

ROBERT B. WATTS,
General Counsel,
ERNEST A. GROSS,
Associate General Counsel,
HOWARD LICHTENSTEIN,
Assistant General Counsel,
ROMAN BECK,
ARMIN UHLER,
Attorneys,
National Labor Relations Board.

JANUARY 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943